

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.**

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC)	WC Docket No. 02-112
Separate Affiliate and Related)	
Requirements)	
)	
2000 Biennial Regulatory Review)	CC Docket No. 00-175
Separate Affiliate Requirements of)	
Section 64.1903 of the Commission's)	
Rules)	
)	

**COMMENTS OF THE PUBLIC SERVICE
COMMISSION OF THE STATE OF MISSOURI**

The Public Service Commission of the State of Missouri (“MoPSC”) offers the following comments in response to the Federal Communication Commission’s (“Commission”) May 19, 2003, Notice of Proposed Rulemaking (NPRM) issued in the above docketed case. The NPRM seeks comment on the appropriate classification of Bell Operating Companies’ (BOCs) and incumbent independent local exchange carriers’ (independent LECs) provision of in-region, interstate and international interexchange telecommunications services. The NPRM also seeks comment on how changes to the competitive landscape within the interexchange market should affect this classification. Finally, the NPRM seeks comment on the appropriate approach to be used for BOCs and independent LECs, if and when these carriers may provide in-region, interexchange services outside of a separate affiliate.

If the interexchange marketplace is deemed competitive, less regulatory scrutiny may be reasonable since competitive forces would presumably make it difficult for any carrier to exercise significant market power in the interexchange market. However, recent trends to bundle

basic local telecommunications services with more competitive services may cause concerns that require additional scrutiny.

While it may be difficult for any one carrier to exercise significant market power in the interexchange marketplace at this time, the MoPSC would caution the Commission to ensure that competition in upstream markets, specifically in the market for basic local telecommunications service, is not adversely impacted by the actions of BOCs or independent LECs in the provision of these competitive services. The Commission recognized this possibility when it previously determined that dominant carrier regulation should be imposed on a carrier only if it could unilaterally raise and sustain prices above competitive levels and thereby exercise market power by restricting its output or by its control of an essential input. (i.e.; A carrier may be able to unilaterally raise prices by increasing its rivals' costs or by restricting its rivals' output through control of such things as access to bottleneck facilities, which its rivals need to offer services).¹ The Commission concluded that because of the requirements of Sections 271 and 272 of the Telecommunications Act of 1996 and the requirements of other Commission rules, the BOC interLATA affiliates lacked such ability, and therefore could be classified as non-dominant in their provision of in-region, interstate and international interLATA services. This non-dominant status was predicated on the presence of Section 272 separate affiliates and full compliance with the structural, transactional and nondiscrimination requirements of Section 272.²

The Commission adopted rules to implement the statutory requirements of Section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*. In the *Non-Accounting Safeguards Order*, the Commission stated that as long as BOCs retain market

¹ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 & 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC RCD 15,802, 15, 847-49, 1997 (*LEC Classification Order*).

power in the provisioning of local exchange and exchange access services within their service areas, the BOCs would have an incentive and ability to discriminate against their long distance competitors and to engage in other anti-competitive conduct.³ The MoPSC suggests that it is this relationship, and the current incentive or ability to discriminate that must be considered as part of this NPRM.

Missouri statute provides that the MoPSC must determine whether effective competition exists for each telecommunications service of an incumbent local exchange carrier (ILEC) in each of the company's exchanges where an alternative local exchange telecommunications company has been certified.⁴ Therefore, the MoPSC established Case No. TO-2001-467 for the purpose of reviewing the status of competition in all of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC) exchanges (competition case). The MoPSC completed its review and issued its Report and Order on December 27, 2001 with an effective date of January 6, 2002.⁵

In the Missouri 271 proceeding Case No. TO-99-227, the MoPSC found alternative local exchange companies were providing service to customers in all SBC exchanges and that SBC had opened its market to competition. However, in the competition case, the MoPSC noted that competitors are not providing service equally throughout all of SBC's exchanges. The MoPSC stated that SBC provides basic local telecommunications in 160 exchanges in Missouri, but competition is greatest in the heavily urbanized areas.⁶ Specifically addressing basic local service, the MoPSC found a substantial number of business customers are being provided

² Id., 12 FCC Rcd at 15,835. *Second Reconsideration Order*, 14 FCC Rcd. At 10,798.

³ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21911-13.

⁴ 392.245.5 RSMo 2000

⁵ The MoPSC Report and Order was affirmed, in part, and reversed, in part, by the Circuit Court of Cole County, Missouri, in *State of Missouri ex rel. Acting Public Counsel John Coffman vs. Public Service Commission of the State of Missouri* in Case No. 02CV323762. The Report and Order was affirmed as to all relevant sections cited here. The Circuit Court's Judgment is subject to appeal to the Missouri Court of Appeals.

⁶ Report and Order. *In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company*. Case No. TO-2001-467. Issued December 27, 2001. Page 13.

functionally equivalent or substitutable basic local service from widely available competitive local exchange carrier (CLEC) owned facilities in the St. Louis and Kansas City exchanges.⁷ The MoPSC also found a substantial number of residential customers are being provided functionally equivalent or substitutable basic local service from widely available CLEC-owned cable telephony facilities in the St. Charles and Harvester exchanges.⁸ Accordingly, for these services in these exchanges, the MoPSC found effective competition exists and determined business or residential basic local service should be classified as competitive in those exchanges. In the remaining exchanges, the MoPSC found that competition from widely available CLEC-owned facilities did not exist for business or residential basic local service.

The MoPSC is currently conducting a similar proceeding for Sprint Missouri, Inc. In this proceeding, Sprint is only seeking competitive status for basic local exchange service in five of its 79 exchanges. The record in this proceeding is still being developed so the MoPSC declines to comment on the specifics of this request, but thought it important to note as a statement on the status of competition in Missouri as a whole.

As further evidence of the status of competition in Missouri, the MoPSC submits the following statistics. Under Missouri statutes, an ILEC is eligible to be price cap regulated when an alternative local exchange telecommunications carrier has been certificated to provide basic local telecommunications services, and is providing such service, in any part of the ILEC's service area. Missouri has four carriers subject to price cap regulation under Section 392.245 of the revised Missouri statutes. These carriers cover approximately 91 percent of the access lines in Missouri. Another 37 ILECs comprise the remaining lines in Missouri, two of which have requested to be regulated under the Missouri price cap statutes.

⁷ Id at page 23.

⁸ Id at page 33.

There are approximately 84 CLECs certificated to provide service in Missouri. For these comments, “certificated” is defined as having received approval from the MoPSC to offer basic local telecommunications service, having approved tariffs on file with the MoPSC and having negotiated and approved interconnection agreements on file with the MoPSC. Of these carriers, 35 are certificated as facilities-based providers. Thirty-three of the certificated carriers provide prepaid service only. Of the certificated carriers, 53 are certificated to provide service in SBC territory, 17 are certificated to provide service in CenturyTel of Missouri, LLC territory, 14 are certificated to provide service in Spectra Communications Group, LLC d/b/a CenturyTel territory and 15 are certificated to provide service in Sprint Missouri, Inc. territory. Two CLECs are certificated to provide prepaid local service in small ILEC exchanges in Missouri.

Should the Commission decide the basic local market will not be impaired by a sunset of Section 272, requirements, Paragraph 13 of the NPRM seeks comment on whether there are any relevant distinctions between a BOC’s in-region, interstate, InterLATA services and its in-region, intraLATA services offered post-sunset. The MoPSC sees no reasonable basis for such distinction, as it has observed trends in the marketplace that seem to move toward blurring the distinction between local minutes and those minutes traditionally considered long distance and/or toll. As discussed in Footnote 39 of the NPRM, a prime example of this trend is the MCI Neighborhood package. Plans such as the Neighborhood package move away from distance sensitive calling and move toward an environment where a minute is just a minute regardless of where it terminates.

Regulation should promote innovation and keep pace with the realities of the marketplace. Carriers often market all of their services in a bundle. The MoPSC cautions the Commission to ensure that careful attention is given to any competitive services bundled with

non-competitive services, such as those offered by BOCs and Independent LECs. The MoPSC urges the Commission to carefully consider the impact of such offerings within the regulatory framework of a still evolving competitive market. The MoPSC is concerned that the goals for attaining a competitive environment may be jeopardized if a regulatory scheme, designed to protect consumers in markets where one company is able to exercise market power, is not left in place until such time as competition is able to effectively substitute for regulation.

The Commission seeks comment on just this idea in paragraph 14 of the NPRM. The MoPSC cautions the Commission to examine the market power of both BOCs and independent LECs in the full context of their operations and not in a piecemeal fashion. In Paragraph 29, the Commission seeks comment on the extent to which BOCs and independent LECs can leverage market power from local exchange and access markets into long distance markets. Specifically, the Commission asks whether the carriers' incentives and abilities to discriminate against rivals increase if they provide international and interexchange services on an integrated basis. The Commission should carefully consider not only the impact of the integrated offering of international and interexchange services but the integrated offering of any non-competitive services with competitive services.

In the SBC competition case, the MoPSC also reviewed the status of competition for switched (exchange) access services in SBC exchanges. It found that SBC was the dominant provider of exchange access services within its service territory. Since no carrier pays itself exchange access rates, the MoPSC found that switched access by its very nature is a locational monopoly. As such, it determined that SBC's switched access service is not subject to effective competition.⁹ The incentives and abilities to discriminate in multiple markets need to be

⁹ Id. at pages 45-47.

carefully examined in order to ensure that the regulatory system is not circumvented by premature removal of Section 272 protections.

The MoPSC has also been monitoring SWBT's performance measurements. Penalty payments associated with the performance measurements began in April 2001. Since that time, the trends seem to indicate SBC's performance may be improving. However, since the inception of the penalty plan, SBC has paid over \$2.7 million to CLECs and over \$1.4 million to the Missouri treasury for Tier 1 and Tier 2 damages. These performance measures, and the resulting penalty payments are based on the Missouri 271 Agreement (M2A), which expires March 6, 2005. With a three-year sunset provision, the separate affiliate requirements of Section 272 would expire in November 2004, approximately four months prior to the expiration of the performance measurement requirements as set forth in the M2A.

Finally, the Commission recently released its report on new entrant switched access lines and local telephone service competition in the United States. According to the report, CLECs had 19.7 million (or 10.2 percent) of the approximately 193 million nationwide switched access lines in service at the end of December 2001. Approximately 22 percent of the CLEC switched access lines are resold lines of other carriers and about 47% are provided by means of leasing unbundled network element loops, including the UNE-Platform. Approximately 31 percent of the CLEC switched access lines are via CLEC-owned local loop facilities. Additional competition may also be provided through such things as wireless service, cable telephony and Internet telephony. The report indicates at least one CLEC was providing local telephone service to end users in 62 percent of the nation's zip codes at the end of 2001.¹⁰

¹⁰ Summary of FCC Form 477 filings made by qualifying providers on March 1, 2002, and reflecting data as of December 31, 2001.

While most of the statistics presented by the MoPSC are limited to SBC exchanges, these exchanges cover approximately 2.7 million of the approximately 3.7 million access lines in Missouri. Since the analysis of competition in SBC exchanges includes nearly all of the major metropolitan areas, and no other evidence has been presented to represent that competition exists to a greater extent in other areas of the state, any recommendations put forth by the MoPSC in these Comments should be equally applicable to all incumbent local exchange carriers.

The MoPSC asserts that without the regional biennial audit process anticipated in Section 272, there is no way to detect and deter discrimination and anti-competitive behavior. Therefore, the MoPSC suggests the Section 272 separate affiliate safeguards be extended for at least one year beyond the current three-year sunset period, via rule or order as anticipated by Section 272(f). Extending the sunset period for one year will provide for review of a more mature affiliate and will allow the inclusion of Missouri-specific data in an additional biennial Section 272 audit prior to the sunset of separate affiliate requirements.

Should the audit results, performance measurement trends and a review of the status of competition within the state not show favorable trends over the time allowed by the additional one-year extension, the MoPSC suggests that it would be appropriate to continue the separate affiliate requirements of Section 272 on an annual basis until such time as the BOC no longer has an incentive and the ability to discriminate against long distance competitors or to engage in other anti-competitive conduct.

In summary, the MoPSC suggests that as competition develops, market forces will replace industry regulation. However, the MoPSC respectfully urges the Commission to ensure that Section 272 protections are not removed until such time as consumers are protected in all

telecommunications markets, not just those markets that appear highly competitive as stand-alone services.

Respectfully submitted,

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